

ADDRESS BY SENATOR STROM THURMOND (D-SC) BEFORE THE VIRGINIA
STATE BAR ASSOCIATION AT WHITE SULPHUR SPRINGS, WEST VIRGINIA,
AUGUST 6, 1955, ON THE CONSTITUTION AND THE SUPREME COURT

Meeting with you here tonight is a great pleasure and privilege. I consider it an unusual honor/to have been invited to speak before such a distinguished association. The States of Virginia and South Carolina/have always/had common interests and common objectives. I hope this fraternity will grow closer with time. Certainly, in the United States Senate, I have felt a strong fraternity with the distinguished Senators representing you. No State is better represented in the Senate than Virginia/and I am happy to count Senators ~~Robertson~~ *and Sen. Byrd* ~~Byrd and Robertson~~ as my friends.

The subject I wish to discuss tonight /is one about which I have been deeply disturbed. I know that you, too, have been concerned with recent events /involving the separation of powers of the three branches of the Federal Government / and the division of rights between the Federal Government and the States.

I still believe in the United States Constitution as a living document, immutable except by the processes established when it was written/to amend itillegally. Believing this, I wish to cite several provisions of this vital instrument of the American government.

To begin with, the Constitution provides in Article I, Section 1, that: "All legislative powers herein granted/
shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

In view of recent developments in our judicial system, I ~~feel~~ it appropriate to read this section of the Constitution again/as you and I have read and re-read it many times in the past. I hope that members of the federal judiciary/will read it/and re-read it again/in the future.

Section 8 of Article I/enumerates the powers of the Congress.

Section 9 of Article I/spells out specific prohibitions and limitations on the powers of the Congress.

Section 10 of Article I/defines limitations on the power of the States and, further, specifies additional limitations which require approval of the Congress prior to action by the States.

Even the clarity of these provisions did not satisfy many of the people/when the Constitution was finally ratified by the nine requisite States/to become effective in 1789. Several States ratified only after long debate/and the adoption of recommendations that a Bill of Rights be added/ to make some of the provisions even clearer.

A total of 124 amendments were proposed by the States for inclusion in the Bill of Rights. Seventeen amendments were accepted by the House, two of which later were rejected by the Senate. The remaining 15 were reduced to 12 before final approval by Congress. The States rejected two of the proposals/and thereby the Bill of Rights was distilled to the original 10 amendments.

The first eight amendments listed certain rights specifically retained by the people. The Ninth stated

that the "enumeration in the Constitution, of certain rights, shall not be construed/to deny or disparage others/retained by the people."

And the Tenth Amendment declared:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Although this amendment did not, of itself, add power to the States, or to the Federal Government, the Tenth Amendment did make clear/the intent of the framers of the Constitution/and the understanding of the States in ratifying the Constitution and the Bill of Rights.

James Madison has been quoted as saying:

"Interference with the power of the States/was no constitutional criterion of the power of Congress. If the power was not given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitutions of the States."

I have no argument with that conception/of the power of the Congress. My contention is that legislative power, not granted even to the Congress, by the Constitution or by statute, has been assumed by the Judiciary. By assumption of such power, the Supreme Court has not only seized power granted the Legislative Branch alone, but the Court has also invaded the specifically reserved rights of the States.

On occasion/a President of the United States has attempted to usurp power vested in the Congress. The most recent example was the steel seizure case. On April 8, 1952, President Truman issued an executive order directing the Secretary of Commerce/to seize and operate most of the steel mills of the country. His purpose was to avoid a nation-wide strike of steel workers/during the Korean War.

President Truman issued the seizure order "by virtue of authority vested in me by the Constitution and laws of the United States, and as President of the United States and Commander in Chief of the Armed Forces of the United States..."

By a six to three opinion/the Supreme Court upheld an injunction of the district court/restraining the seizure. Justice Black wrote the majority opinion in which he pointed out/that no statute expressly authorized or implied authorization/for the President to seize the steel mills; that in its consideration of the Taft-Hartley Act in 1947, the Congress refused to authorize government seizure of property/as a means of preventing work stoppages and settling labor disputes. He also declared that the power sought to be exercised was the law-making power, which the Constitution vests in the Congress alone. Further, he pointed out that such previous actions by the Chief Executive/did not thereby divest the Congress of its exclusive law-making authority.

Thus the Supreme Court was quick to repel/this latest attempt by a Chief Executive/to exercise authority/not vested in him/by the Constitution or by statute.

But the Court's memory was short indeed/when it considered the school segregation cases. The Court itself usurped the

power of the Congress/by its decision on May 17, 1954, and its decree of May 31, 1955.

By this time, you are probably wondering if I am avoiding mention of the Fourteenth Amendment/upon which the appellants in the school cases depended for their argument/that the States could not separate the races in the public schools.

I am not avoiding it. I want to discuss it with you tonight.

In the first hearing, the Supreme Court asked the appellees, including school districts in South Carolina and Virginia, to present evidence at the rehearing, which was held in December 1953, on the understanding of the Fourteenth Amendment at the time of its enactment. Information was required on the Congress which approved the amendment/and the States which ratified it.

The preponderance of evidence presented in the briefs showed ^{that} the Congress which approved the amendment/and, the

States which ratified it, did not understand it as applying to segregation in the schools.

As the brief in the South Carolina case pointed out, the "debates of the 39th Congress on the First Supplemental Freedman's Bill, the Civil Rights Act of 1866 and the Fourteenth Amendment/contain no evidence of any intention on the part of Congress/to forbid school segregation."

The brief also pointed out that "of the 37 States to which the Amendment was submitted, only five abolished or prohibited segregation in their schools/when they ratified the Amendment; and there is no evidence that they did so because they thought the Amendment required such action/ rather than as a matter of local educational policy. Of these five, three later established segregated school systems/ after the Fourteenth Amendment had become a part of the Constitution of the United States."

Nine States did not have segregated schools when the amendment was submitted to them.

Four States, in which segregated schools were maintained when the Fourteenth Amendment was ratified, refused to ratify the amendment, but there was no evidence in the proceedings of their Legislatures /that they did not do/so/ because of any understanding that the Amendment prohibited segregated schools.

Two States had segregated schools and have maintained them.

Nine Northern States were operating segregated schools /and either continued to do so or re-established them.

Eight seceded States continued to operate, or immediately re-established, segregated schools /after ratification of the amendment.

Of course, I have merely touched on the strong evidence that the Fourteenth Amendment was not understood /at the time of its ratification/ to prohibit segregated schools. But, the evidence was well documented in the briefs presented to the Court. Significantly, the evidence was not refuted.

However, the Court saw fit largely to disregard this evidence for which it had asked. Commenting on the evidence, the Court said on May 17, 1954:

"...This discussion and our own investigation convince us/that, although these sources cast some light, it is not enough to resolve the problem with which we are faced.

"At best, they are inconclusive. The most avid proponents of the post-war amendments undoubtedly intended them/to remove all legal distinctions among 'all persons born or naturalized in the United States.'

"Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the amendments/and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind/cannot be determined with any degree of certainty."

I want you to note particularly the use of the Court's words "undoubtedly intended," in reference to what the proponents of the Fourteenth Amendment thought. The Court cast aside the real evidence presented/as "inconclusive,"

but, by some unstated power, arrived at the intent of dead partisans/where no evidence existed.

Admitting that the question was not one of equalization of facilities and other "tangible" factors, the Court stated:

"Our decision, therefore cannot turn merely on a comparison of these tangible factors in the Negro and white schools/ involved in each of the cases. We must look instead to the effect of segregation itself on public education."

This statement is clearly an admission/that the decision was not rendered on the basis of any provision of the Constitution. Regardless of what the Court called "inconclusive" evidence, as to the understanding of the Fourteenth Amendment when it was adopted in 1868, the Court did not have to rely on that amendment alone/in view of the clarity of the Tenth Amendment. When the Court found itself in doubt as to the intent of the Fourteenth Amendment--and its questions showed doubt existed--then the Court should have relied on other provisions of the Constitution not lacking in clarity.

However, the Court made its position still more untenable/ by its comments on the time elapsed since adoption of the Fourteenth Amendment/and the Plessy v. Ferguson decision of 1896, by which the doctrine of "separate but equal" school facilities was established.

The Court said:

"We cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the lights of its full development/and its present place in American life throughout the nation. Only in this way can it be determined/if segregation in public schools/deprives these plaintiffs of the equal protection of the laws."

In other words, the Court was no longer interested in the evidence it had requested, regardless of the understanding of the Congress which approved/and the States which ratified the Fourteenth Amendment.

The doctrine of "separate but equal" was established on the Constitution, and even if the Fourteenth Amendment

had not existed, the doctrine would have been fair and equitable to apply/to the expenditure of public funds for public schools. No responsible official of a State government/ would deny the obligation of the State to provide equal facilities for the races. Virtually all of the Southern States have already fully complied with that doctrine.

In my own State of South Carolina/more funds have been allocated for Negro schools in the past several years/than for the construction of white schools. In less than four years, South Carolina has spent about \$150,000,000 on the construction of new schools, with approximately 60 per cent being for Negroes. Since white pupils outnumber Negro pupils in South Carolina by three to two, this means that approximately twice as much per capita/has been spent for Negro pupils for school construction.

Long ago differences in teachers salaries were wiped out/and salaries based on knowledge, training, and experience. My State is meeting the responsibility which goes with the Constitutional right for State regulation of public schools.

I know that Virginia and the other States are meeting their responsibility too.

But let us consider further how the Court arrived at its decision/to destroy provisions of the Constitutions and/or the laws of 17 States and the District of Columbia. It legislated by judicial fiat/in a field which even the Congress had not invaded.

Thus, in this decree, the Court disregarded the distinctions made in the first and third articles of the Constitution/between the powers of the Congress and the Judiciary. The same decree also over-rode the eighth and ninth sections of Article I of the Constitution/and the Tenth Amendment, in which the rights of the States are enumerated.

Although the Court admitted that "education is perhaps the most important function of State and local governments," it failed to follow that thought to its logical conclusion. The conclusion would be that, in lieu of specific Constitutional or statutory limitation, the States have the power to operate

the kind of public schools they deem best, the equity of all pupils being protected.

Quoting from the decision in the Kansas case, the Court stated:

" '...A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children/and to deprive them of some of the benefits they would receive in a racially integrated school system.' "

If this thesis had validity, the Court also should have treated the question of whether an adverse affect would result/from the mixing of children of the same age level of lower intelligence with those of higher intelligence. Certainly differences of inferiority and superiority would be emphasized greatly by close proximity. What would be the effect on the pupils of higher intelligence levels? Would they have to follow instruction geared to less intelligent pupils? Educators have long advocated that

greater opportunities be provided for exceptional pupils.

They have not recommended mixing them with less able pupils.

Still referring to the "sense of inferiority" of segregated pupils, the Court said:

"Whatever may have ^{been} the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority." Then, in a footnote, it cited a group of psychologists. Disregarding the degree of objectivity exercised by these psychologists, I do question the authority of the Court/to replace the Constitution with opinions expressed in textbooks.

On May 31 of this year, the school cases were remanded to the district courts, leaving to them the setting of time for compliance. On July 15 the case which arose in Clarendon County, South Carolina, was heard in Columbia before a three-judge federal court composed of Judges John J. Parker, Armistead M. Dobie and George Bell Timmerman. Judges Parker and Timmerman had sat on the original court/which had ruled

that the doctrine of "separate but equal" school facilities for the races/was not violative of the Constitution.

In his opening remarks at the hearing on July 15, Judge Parker said:

"Whatever may have been the views of this Court as to the law when the case was originally before us, it is our duty now to accept the law as declared by the Supreme Court.

"Having said this, it is important that we point out exactly what the Supreme Court has decided/and what it has not decided in this case. It has not decided/that the federal courts are to take over or regulate the public schools of the States. It has not decided/that the States must mix persons of different races in the schools/or must require them to attend schools/or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a State may not deny to any person on account of race/the right to attend any school that it maintains. This, under the decision of the Supreme Court, the State may not do directly or indirectly/

but, if the schools which it maintains are open to children of all races, no violation of the Constitution is involved/ even though the children of different races voluntarily attend different schools, as they attend different churches."

Judge Parker's words point clearly to a means of continued school segregation on a voluntary basis. Were it not for the agitators who have no regard for the Constitution/and for the best interests of a majority of both races, I believe voluntary segregation would work satisfactorily.

However, I cannot tell you that I believe it will work. Already petitions have been filed in several districts of South Carolina, since this hearing, asking for the admission of Negro pupils to white schools, where facilities are equal or better for the Negroes. The same thing is happening in other States.

But permit me to quote Judge Parker further:

"Nothing in the Constitution or the decision of the Supreme Court/takes away from the people/freedom to choose

the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the State or State agencies, not a limitation upon the freedom of individuals.

"The Supreme Court has pointed out that the solution of the problem in accord with its decisions/is the primary responsibility of school authorities/and that the function of the courts is to determine whether action of the school authorities/constitutes 'good faith implementation of the governing constitutional principles.' ..."

Let me emphasize Judge Parker's statements/that "the Constitution does not require integration," and that "it merely forbids the use of governmental power to enforce segregation." These words are extremely important to the officials of the States and the schools, as we consider means of maintaining our way of life under the Constitution.

The solution to the problem lies in the hands of the States. While the Congress never would have been able to amend the Constitution, or to pass legislation, to declare separate school facilities discriminatory, neither could it now enact legislation to over-rule the action of the Court.

There are not enough people in Washington/concerned with the same principles on which our Constitution was established/to pass such regulatory measures.

Therefore, the States and school districts must construct laws and regulations within the principles stated by the Court. Not even the edict of the Court prevents the adoption of systems of classifying pupils/other than that of race.

A friend has written me suggesting, facetiously, that I should introduce a bill making all legislation by the Supreme Court/subject to review by the Congress. I agree this would be just as constitutional/as what the Court itself has done.

I reject the contention of the propagandists/who have convinced some sincere persons that the Supreme Court has

spoken/and everybody should bow to what the Court has declared "the law of the land."

Those persons who sought to destroy the Constitution and the rights of the States/did not meekly bow to the doctrine of "separate but equal"/established under the Constitution by the Plessy v. Ferguson decision. Instead, for a half century, they conducted a propaganda campaign against the Constitution/and against the decision of a respected Court.

We might do well to adopt the tactics of our opponents. If propaganda and psychological evidence are effective for our opponents, they can be effective for us. Our worthy objective of preserving the Constitution/justifies the method.

Not only must the States find substitutes for the constitutional practices which have been invalidated, they must also fight each case/with every legal weapon at their disposal. They must, at the same time, hold to the provision of equal facilities for the races, in spite of the temptation to forget humane treatment for those who exert pressures of propaganda and the courts.

In the Congress, I, for one, shall fight against every effort to enact legislation/which I believe discriminatory against the greatest minority group in this nation--the white people of the South--who have been subjected to abuse worthy of the dictators.

I also propose to consider carefully every nomination made by the Chief Executive to the courts/and to other positions of power. If I find the appointee, by his actions and statements, to be disqualified for the trust he would assume, I shall vote against his confirmation. By this method, the Senate can exert its rightful power/in an effort to protect the Constitution against further inroads.

I deem it my duty, my solemn obligation, under my oath, to take such action to defend the Constitution of the United States.

The process of adaptation of the Constitution to changing times had attained a speed so great/that in *Smith v. Allwright* in 1944, the late Justice Roberts declared that Supreme

Court decisions appeared to have taken on the attributes of restricted railroad tickets, valid only for the date of their issuance.

As attorneys, you probably know that in the 18 years since 1937, 33 previously formulated principles of constitutional law/have been discarded or over-ruled by the Supreme Court. In the preceding 137 years of this nation under the Constitution, only 29 previously established principles/were over-ruled.

From the beginning, the lawyers of this country have had a strong hand in making it a great nation. Of the 56 men who signed the Declaration of Independence, 24 were lawyers. Twenty-one of the 39 delegates who drafted and signed the Constitution also were lawyers. A high percentage of the members of the ^{Congress and the} State legislatures today/are lawyers. No other profession has contributed so much/to the establishment and the maintenance of our Government.

As your able and devoted forefathers fought the fights of liberty---on the battlefields and in the law-making bodies--- I hope you will devote your legal talents to preserving the

guarantees of the Constitution. We have seen in other lands/
what happens to the rights of the people/when duly constituted
government is destroyed.

We cannot flinch/at being charged with "impeding progress."
The Supreme Court/by its decree/has impeded the progress
made in 75 years of work/to ^{provide} equal and adequate public
education for the white and Negro children of the South.
No accuser can point his finger in any other direction with
as much accuracy.

THE END